

1 Miles D. Grant (SBN 89766)  
2 **GRANT & ZEKO, APC**  
3 1331 India Street  
4 San Diego, California 92101  
5 Telephone; 619-233-7078  
6 Facsimile: 619-233-7036  
7 E-Mail: [mgrant@grantandzeko.com](mailto:mgrant@grantandzeko.com)

8 Gregory F. Ahrens (*Pro Hac Vice*)  
9 Brett A. Schatz (*Pro Hac Vice*)  
10 **WOOD, HERRON & EVANS, L.L.P.**  
11 441 Vine Street  
12 2700 Carew Tower  
13 Cincinnati, Ohio 45202  
14 Telephone: 513-241-2324  
15 Facsimile: 513-421-7269  
16 E-Mail: [gahrens@whepatent.com](mailto:gahrens@whepatent.com)  
17 [bschatz@whepatent.com](mailto:bschatz@whepatent.com)

18 Attorneys for Plaintiff  
19 Presidio COMPONENTS, INC.

20 **UNITED STATES DISTRICT COURT**  
21 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

22 Presidio COMPONENTS, INC.	)	Case No. 3:08-CV-00335-IEG-NLS
	)	
23 Plaintiff,	)	<b>PLAINTIFF PRESIDIO</b>
	)	<b>COMPONENTS, INC.'S</b>
24 v.	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES IN SUPPORT OF</b>
25 AMERICAN TECHNICAL	)	<b>ITS MOTION FOR PERMANENT</b>
26 CERAMICS CORP.,	)	<b>INJUNCTION</b>
	)	

27 Defendant.)

28 Hearing Date: February 26, 2010  
Hearing Time: 9:00 am  
Courtroom 1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. STATEMENT OF FACTS.....	3
A. Presidio’s Business.....	3
B. Presidio Develops The Unique One-Piece BB Capacitor To Solve Long-Felt Needs In The Industry.....	4
C. Presidio Is Forced To File Suit To Obtain An Injunction Necessary To Maintain Its Business .....	5
D. Irreparable Harm to Presidio Continues.....	7
III. ARGUMENT .....	7
A. The Standard For Granting A Permanent Injunction.....	7
B. Presidio Is Suffering An Irreparable Injury .....	10
1. The Jury’s Finding Demonstrates Irreparable Harm .....	10
2. Presidio And ATC Are In Direct Competition .....	15
3. ATC’s Infringing Activities Have Damaged Presidio’s Reputation ....	18
C. Monetary Damages Are Inadequate For Presidio’s Injury .....	19
D. The Balance of Hardships Favors Presidio And Warrants An Injunction .....	22
E. The Public Is Served By Enforcing Presidio’s Patent Rights .....	24
IV. CONCLUSION .....	25

## TABLE OF AUTHORITIES

## Page

## Cases

<i>3M Innovative Props. Co. v. Avery Dennison Corp.</i> , Case No. 01-1781, 2006 U.S. Dist. LEXIS 70263, at *5 (D. Minn. Sep. 25, 2006).....	21
<i>Abbott Labs. v. Andrx Pharms., Inc.</i> , 452 F.3d 1331 (Fed. Cir. 2006) .....	24
<i>Advanced Cardiovascular Systems, Inc. v. Medtronic Vascular, Inc.</i> , 579 F.Supp. 2d 554 (D. Del. 2008) .....	13, 14, 24
<i>Amado v. Microsoft</i> , 517 F.3d 1353 (Fed. Cir. 2008) .....	13
<i>Amoco Prod. Co. v. Vill. of Gambell</i> , 480 U.S. 531 (1987) .....	16
<i>Atlas Powder Co. v. Ireco Chems.</i> , 773 F.2d 1230 (Fed. Cir. 1985) .....	20
<i>Bell &amp; Howell Doc. Mgmt. Prods. Co. v. Altek Sys.</i> , 132 F.3d 701 (Fed. Cir. 1997).....	17
<i>BIC Corp. v. Thai Merry Co.</i> , Case No. 98 Civ. 2113, 1999 U.S. Dist. LEXIS 15991, at *14-15 (S.D.N.Y. Oct. 18, 1999) .....	9, 12
<i>Black &amp; Decker v. Robert Bosch Tool Corp.</i> , Case No. 04-C-7955, 2006 U.S. Dist. LEXIS 86990, at *11 (N.D. Ill. Nov. 29, 2006) .....	22
<i>Broadcom Corp. v. Qualcomm Inc.</i> , 543 F.3d 683 (Fed. Cir. 2008).....	10, 11, 13, 23, 24
<i>Christiana Indus., Inc. v. Empire Elecs., Inc.</i> , Case No. 06-12568, 2006 U.S. Dist. LEXIS 54210, at *5 (E.D. Mich. Aug. 4, 2006).....	12
<i>Ciena Corp. v. Corvis Corp.</i> , 334 F. Supp. 2d 610 (D. Del. 2004).....	12
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 126 S. Ct. 1837 (2006) .....	1, 2, 7, 8, 9, 12
<i>Fisher-Price, Inc. v. Safety 1st, Inc.</i> , 279 F. Supp. 2d 526 (D. Del. 2003) .....	20
<i>Fresenius Medical Care Holdings v. Baxter Int'l.</i> , Case No. C-03-1431, 2008 U.S. Dist. LEXIS 79689, at *13 (N.D. Ca. April 4, 2008).....	10, 11, 13
<i>Funai Electric Co v. Daewoo Electronic Corp.</i> , 593 F.Supp. 2d 1088 (N.D. Ca. Jan. 5, 2009) .....	13
<i>High Tech Medical Instrumentation v. New Image Indus.</i> , 49 F.3d 1551 (Fed. Cir. 1995).....	9
<i>Hybritech, Inc. v. Abbott Laboratories</i> , 849 F.2d 1446, 156 (Fed. Cir. 1988) .....	17
<i>I-Flow Corp. v. Apex Medical Tech., Inc.</i> , Case No. 07-cv-1200, 2010 U.S. Dist. LEXIS 1021 (S.D. Cal. Jan. 6, 2010) .....	9, 10, 11, 13, 21, 25
<i>Kowalski v. Mommy Gina Tuna Resources</i> , Case. No. 05-679, 2009 U.S. Dist. LEXIS 26216, at * 3-4 (D. Haw. Mar. 30, 2009).....	12, 16

1	<i>L&amp;W, Inc. v. Shertech, Inc.</i> , Case No. 01-73892, 2005 U.S. Dist LEXIS	
2	34635, at *9 (E.D. Mich. Sept. 28, 2005).....	12
3	<i>Mezzalingua Assocs. v. Arris Int’l, Inc.</i> , 298 F. Supp. 2d 813	
4	(W.D. Wis. 2003).....	23
5	<i>Muniauction, Inc. v. Thomson Corp.</i> , 502 F.Supp. 2d 477, 482-84	
6	(W.D. Pa. 2007) .....	11
7	<i>Paice LLC v. Toyota Motor Corp.</i> , Case No. 2:04-cv-211-DF, 2006 U.S. Dist.	
8	LEXIS 61600 (E.D. Tex. Aug. 16, 2006) .....	24
9	<i>Polaroid Corp. v. Eastman Kodak Co.</i> , 641 F. Supp. 828 (D. Mass. 1985) .....	19
10	<i>Polymer Techs. v. Bridwell</i> , 103 F.3d 970, 975-976 (Fed. Cir. 1996) ....	16, 17, 18, 19
11	<i>Purdue Pharma L.P. v. Boehringer Ingelheim GmbH</i> , 237 F.3d 1359	
12	(Fed. Cir. 2001).....	19
13	<i>Reebok Int’l Ltd. v. J. Baker, Inc.</i> , 32 F.3d 1552 (Fed. Cir. 1994).....	19, 22
14	<i>Richardson v. Suzuki Motor Co.</i> , 868 F.2d 1226 (Fed. Cir. 1989).....	12
15	<i>Rite-Hite Corp. v. Kelley Co.</i> , 56 F.3d 1538 (Fed.Cir.1995) .....	24
16	<i>Smith Int’l, Inc. v. Hughes Tool Co.</i> , 718 F.2d 1573 (Fed. Cir. 1983).....	8, 9, 24
17	<i>TiVo Inc. v. EchoStar Communs. Corp.</i> , 446 F. Supp. 2d 664,	
18	669 (E.D. Tex. 2006) .....	16
19	<i>Visto Corp. v. Seven Networks, Inc.</i> , Case No. 2:03-cv-333,	
20	2006 U.S. Dist. LEXIS 91453, at *12 (E.D. Tex. Dec. 19, 2006) .....	15
21	<b>Statutes</b>	
22	35 U.S.C. § 154.....	7
23	35 U.S.C. § 154(a)(1) .....	8
24	35 U.S.C. §283.....	8

## I. INTRODUCTION

Plaintiff Presidio Components, Inc.’s (“Presidio”) patent infringement case against Defendant American Technical Ceramics Corp.’s (“ATC”) has never just been about obtaining a monetary judgment to compensate it for ATC’s infringement. From the day its Complaint was filed, Presidio’s primary objective has been to obtain injunctive relief to stop its much larger competitor, ATC, from infringing its patented technology. At trial, Presidio’s Lambert Devoe testified that an injunction is critical for Presidio’s survival and for this reason Presidio has never licensed its patented technology. Demonstrating this is the fact that Presidio spent more money pursuing this case in order to obtain a permanent injunction against ATC than it ever hoped to recover in the form of infringement damages. The jury’s recent verdict, which found United States Patent No. 6,816,356, (hereinafter “the ‘356 patent”) valid and willfully infringed, has established the appropriateness of the requested injunctive relief.

The Supreme Court’s recent decision in *eBay Inc. v. MercExchange, L.L.C.*, reconfirmed this Court’s power to grant permanent injunctive relief to plaintiffs who can demonstrate (1) irreparable harm, (2) inadequacy of monetary damages, (3) hardship, and (4) and no disservice to the public interest. 126 S. Ct. 1837, 1839 (2006). Ever since *eBay*, courts almost always grant injunctive relief where, as here, the infringer is a competitor of the patent holder. Indeed, such relief is certainly

1 appropriate in this case, where all of the aspects of the *eBay* test favor Presidio.  
2 Specifically, the facts of this case support a finding in favor of Presidio on each of  
3 these factors; thus, a permanent injunction is warranted:

4           1.     *Irreparable harm:* Presidio and ATC are direct competitors, selling a  
5 broad range of competing capacitor products in the same market and to the same  
6 customers and potential customers. ATC's continued infringement is directly and  
7 irreparably harming Presidio, one reason why Presidio has refused to license this  
8 technology.  
9

10           2.     *No adequate monetary remedy:* Presidio's competitive harms cannot be  
11 adequately compensated by an award of monetary damages as ATC's continued  
12 sales of a competing and infringing capacitor has altered and continues to alter the  
13 market. Additionally, Presidio's reputation and goodwill as the sole provider of  
14 unique solutions to its customers' problems are being damaged. Armed with  
15 Presidio's technology, ATC has infringed its way into a position where it has  
16 represented, and could in the future represent, to Presidio's customers that it can  
17 provide the same solutions to problems as can Presidio.  
18

19           3.     *Balance of Hardships:* The balance of hardships favors the much  
20 smaller Presidio, whose loss of patent exclusivity presents a serious, irreparable  
21 injury and whose lost sales opportunities in this competitive marketplace create a  
22 significant hardship. By contrast, ATC's \$90 million plus in annual sales shows that  
23  
24  
25  
26  
27

1 an injunction prohibiting the sale of one product line with modest (for ATC) annual  
2 sales will pose no hardship to ATC.

3 4. *Public Interest:* Finally, the public interest factor of enforcing valid and  
4 infringed patents supports the grant of injunctive relief in this case. ATC's ongoing  
5 infringement has irreparably harmed Presidio's business and it is apparent through  
6 ATC's continuing infringement to this day that ATC will only stop if this Court  
7 issues a permanent injunction.  
8  
9

## 10 **II. STATEMENT OF FACTS**

### 11 **A. Presidio's Business**

12 Presidio is a family-owned, small company located in San Diego. Presidio  
13 began in 1980 when Dan and Violet Devoe devoted all of their savings, and took a  
14 second mortgage on their house, to start Presidio. (Trial Tr. 1 at 11:13-25). At the  
15 outset, Dan Devoe designed unique capacitor solutions for Presidio's customers on  
16 his kitchen table, working 12-hour days, 7 days a week. *Id.* Today, Dan's two sons  
17 Alan and Lambert take the lead in running Presidio. *Id.* at 15:22-16:6. Presidio has  
18 only 175 employees, but even with its sparse resources is able to develop and  
19 manufacture sophisticated and unique solutions for its customers. *Id.* at 12:9-13:5;  
20 Trial Tr. 2 at 72:10-22.  
21  
22  
23  
24

25 Presidio is a niche player, selling only a few products for a few industries that  
26 require a higher level of engineering expertise, and does not sell high volume,  
27

1 standard capacitors. (Trial Tr. 1 at 12:9-13:5). Presidio has one dominant product,  
2 the Buried Broadband capacitor (“BB capacitor”). Presidio’s BB capacitor is  
3 involved in this lawsuit and targets broadband frequency applications. *Id.* It has  
4 taken Presidio years of work with its customers in testing and developing  
5 technologies that match their customers’ needs. *Id.* at 14:25-15:15. On this basis,  
6 Presidio has developed a reputation of a respected supplier of new products and new  
7 ideas that solve unique customer problems. *Id.* In short, the industry knows  
8 Presidio as the only company to contact when unique problems arise.

11 **B. Presidio Develops The Unique One-Piece BB Capacitor To Solve**  
12 **Long-Felt Needs In The Industry**

13 Presidio was prompted to solve certain problems raised in the industry;  
14 specifically, capacitor manufacturers’ limited offering to their customers for both  
15 low and high frequency applications involved two independent capacitors, to be  
16 joined in parallel. *Id.* at 18:1-17. However, this “two-piece design” resulted in  
17 particular frequencies where problematic “suckouts” were experienced. *Id.* Use of  
18 the two-piece design would therefore result in discontinuity, and loss, in the transfer  
19 of data. *Id.* at 18:18-19:8. Even more problematic for customers was that the two –  
20 piece capacitors had to be manually placed on a circuit board and joined through  
21 epoxy or paste, a time consuming and extremely difficult process, given how tiny  
22 these capacitors are. *Id.* at 19:9-18. This posed a “huge” problem and was “a  
23 nightmare assembly part” for customers. *Id.* at 19:9-18; 20:5-21:15. It was such a



1 severe problem for customers that the very few individuals in the entire United  
2 States that could work with the two-piece design were dubbed “golden operators.”  
3 *Id.* at 19:9-18; 26:3-20.

4         Presidio’s BB capacitors are background to the inventions ultimately claimed  
5 in United States Patent No. 6,816,356 (“the ‘356 patent”). That is, these capacitors  
6 were designed as a combination of two separate capacitors in a one-piece design.  
7 As a result, Presidio’s BB capacitors could be placed directly on a circuit board by  
8 Presidio’s customers, allowing them to avoid the time consuming and extremely  
9 difficult process of joining capacitors. *Id.* at 23:7-24:3. This solved the severe  
10 “golden operator” problems that customers were complaining about. Presidio’s BB  
11 capacitors employ a “substantially monolithic dielectric body,” as used in the claims  
12 of the ‘356 patent. *Id.* at 26:3-20. The solution offered by Presidio’s BB capacitors  
13 was previously unheard of. *Id.* at 27:1-20.

14         **C. Presidio Is Forced To File Suit To Obtain An Injunction Necessary**  
15         **To Maintain Its Business**

16         In April 2007, Presidio wrote to ATC regarding the ‘356 patent and the  
17 infringing 545L capacitor. Specifically, Mr. Alan Devoe wrote to three officers of  
18 ATC, identifying the ‘356 patent and the 545L capacitor. At trial, ATC’s officer  
19 responsible for ATC’s Code of Conduct and Compliance, Kathleen Kelly, testified  
20 that ATC did not recall receiving notice. However, she would have forwarded it  
21  
22  
23  
24  
25  
26  
27

1 individuals who should have handled it. (Trial Tr. 5 at 34:5-35:15). ATC never did  
2 respond.

3       It became evident through the trial testimony of other ATC employees, such  
4 as Mr. John Mruz, that ATC was fully aware of the ‘356 patent years before. ATC  
5 reviewed the ‘356 patent publication while the 545L capacitor was being designed.  
6 (Trial Tr. 3 at 116:3; Dep. Tr. at 127:16-19). Indeed, ATC admitted that it decided,  
7 after obtaining Presidio’s BB capacitor and evaluating it, to “emulate” Presidio’s  
8 capacitor design. *Id.* at 91:3-92:3. ATC did so because it was not smart enough to  
9 develop such a design on its own. *Id.* at 99:11-100:4. That “emulation” led to  
10 ATC’s infringement.  
11  
12  
13

14       ATC’s infringement has severely damaged Presidio, including its reputation  
15 and goodwill with its customers. Specifically, Presidio serves a niche market in  
16 which Presidio enjoys a reputation of being the problem – solver for difficult  
17 applications. (Trial Tr. 2 at 110:24-112:16). ATC’s infringement leads customers  
18 to question why ATC has been able to solve the problems that, absent ATC’s  
19 infringement, only Presidio has demonstrated a capability to solve. *Id.* at 110:1-20.  
20 In doing so, ATC is “taking away [Presidio’s] relationship that [it] has with [its]  
21 customer.” *Id.* This has a strong negative impact on Presidio’s future business. *Id.*  
22  
23  
24

25       Because ATC effectively ignored that its 545L capacitor infringed the ‘356  
26 patent, and ignored the notice Presidio gave to ATC, Presidio was forced to sue for  
27

1 infringement to protect its business. The jury has now found that the 545L capacitor  
2 infringes the '356 patent, and that ATC's conduct was willful.

### 3 **D. Irreparable Harm to Presidio Continues**

4 Since the jury found Presidio's '356 patent valid and willfully infringed by  
5 ATC in December 2009, ATC has recklessly continued offering for sale the 545L  
6 capacitor. (*See* Exhibit A). Thus, Presidio has suffered and continues to suffer  
7 irreparable harm as a direct result of ATC's sales of infringing 545L capacitors.  
8  
9 Clearly, ATC has taken improper advantage of Presidio's patented technology to  
10 obtain market advantage. It has chosen to do so despite having been found a willful  
11 infringer. Not even the jury's verdict has persuaded ATC that it should end its  
12 willful infringement. Any further delay in granting an injunction deprives Presidio  
13 of the benefits of exclusivity under 35 U.S.C. § 154 meant to protect this innovative  
14 technology.  
15  
16  
17

## 18 **III. ARGUMENT**

### 19 **A. The Standard For Granting A Permanent Injunction**

20 In accordance with well established principles of equity, as the Supreme  
21 Court recently reaffirmed in *eBay*, a plaintiff seeking a permanent injunction is to  
22 provide evidence according to a four-factor test:  
23  
24

- 25 1. that it has suffered an irreparable injury;
- 26 2. that remedies available at law, such as monetary  
27 damages, are inadequate to compensate for that injury;

3. that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
4. that the public interest would not be disserved by a permanent injunction.

126 S. Ct. at 1839. As Chief Justice Roberts wrote in a concurrence to the *eBay* case, the “long tradition” of entering injunctions upon the finding of patent infringement is natural “given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee’s wishes.” *Id.* at 1841 (Roberts, C.J., concurring). This “long tradition” is based on cases where, as here, the patentee should be given its Constitutional right to exclude others from “emulating” innovative technology.

Congress has explicitly provided patentees with a “right to exclude others” from practicing a patented invention. 35 U.S.C. § 154(a)(1). Congress has given the courts authority to enforce this right by entering injunctions against infringers: “The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. §283.

Federal courts routinely recognize and exercise this right: “The very nature of the patent right is the right to exclude others.” *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983). “Once the patentee’s patents have been held

1 to be valid and infringed, he should be entitled to the full enjoyment and protection  
2 of his patent rights. The infringer should not be allowed to continue his  
3 infringement in the face of such a holding.” *Id.*

4  
5 Only weeks ago, Honorable Judge Sabraw for the Southern District of  
6 California gave credence to *eBay* by issuing a permanent injunction against a  
7 defendant having been found an infringer by a jury. *I-Flow Corp. v. Apex Medical*  
8 *Tech., Inc.*, Case No. 07-cv-1200, 2010 U.S. Dist. LEXIS 1021 (S.D. Cal. Jan. 6,  
9 2010). Indeed, permanent injunctions may be entered after summary judgment and  
10 even before a trial. *High Tech Medical Instrumentation v. New Image Indus.*, 49  
11 F.3d 1551, 1554 (Fed. Cir. 1995) (35 U.S.C. §283 “authorizes courts in  
12 infringement actions to grant preliminary injunctions pending trial, as well as  
13 permanent injunctions after a full determination on the merits.”). In *BIC Corp. v.*  
14 *Thai Merry Co.*, the Court granted the patentee’s motion for permanent injunction  
15 after granting summary judgment of infringement and before the trial. Case No. 98  
16 Civ. 2113, 1999 U.S. Dist. LEXIS 15991, at \*14-15 (S.D.N.Y. Oct. 18, 1999). The  
17 *BIC Corp.* court stated that the fact “[t]hat patent validity and infringement are  
18 determined upon summary judgment should not affect” the general rule that “an  
19 injunction will issue when infringement has been adjudged.” *Id.*

20  
21 Here, the jury found for Presidio after a full trial, finding the ‘356 patent to be  
22 valid and infringed. This constitutes a full determination on the merits of the  
23  
24

1 parties' claims and defenses as they relate to the '356 patent. Thus, it is proper for  
2 Presidio to move for a permanent injunction and for this Court to determine whether  
3 such an injunction is warranted. Presidio is requesting a permanent injunction like  
4 that issued by Judge Sabraw in *I-Flow*.  
5

## 6 **B. Presidio Is Suffering An Irreparable Injury**

### 7 **1. The Jury's Finding Demonstrates Irreparable Harm**

8  
9 "[T]he principal value of a patent is the right to exclude arch competitors  
10 from making, selling and using an infringing product." *Fresenius Medical Care*  
11 *Holdings v. Baxter Int'l.*, Case No. C-03-1431, 2008 U.S. Dist. LEXIS 79689, at  
12 \*13 (N.D. Ca. April 4, 2008). Thus, it is no surprise that the Federal Circuit has  
13 declared that a competitor's infringement causes irreparable harm to a patent holder  
14 regardless of whether the patent holder's own product practices the invention. Last  
15 year, in *Broadcom Corp. v. Qualcomm Inc.*, the Federal Circuit concluded that there  
16 was irreparable harm, "despite the fact that [the patent holder] does not currently  
17 practice the claimed inventions." 543 F.3d 683, 703 (Fed. Cir. 2008) (affirming the  
18 district court's permanent injunction). That is because the impact of a competitor's  
19 continuing infringement is not limited to the monetary value of the products  
20 themselves, but rather extends to the goodwill that is built up while supplying  
21 customers – goodwill which the patent holder, not the infringer, is entitled to accrue.  
22 Hence, "[t]he law favors [a patent holder's] right to the full value of its property,  
23  
24  
25  
26  
27

1 particularly the ability to keep it out of its main competitor's hands." *Fresenius*  
2 *Medical*, 2008 U.S. Dist. LEXIS 79689, at \*13 (citing *Muniauction, Inc. v. Thomson*  
3 *Corp.*, 502 F.Supp. 2d 477, 482-84 (W.D. Pa. 2007)).

4 As the *Broadcom* court recognized, the value to the patent holder is  
5 particularly high in markets for intermediate goods sold to end-manufacturers, as  
6 opposed to final, consumer goods. In such markets, like that involved here, even  
7 indirect competition of products is significant:  
8

9  
10 ' [t]he market for baseband chips is unlike the typical  
11 market for consumer goods where competitors compete  
12 for each consumer sale, and the competition is  
13 instantaneous and on-going...In this kind of a market, the  
14 exclusion has a competitive effect on a firm even if it does  
15 not have an immediately available product.'

16 *Id.* at 703 (quoting the district court's Injunction Opinion, at 5-6) (emphasis added).

17 The *Broadcom* court's rationale is as applicable to capacitors as to baseband chips.

18 Simply by selling its infringing product, ATC is diluting Presidio's ability to  
19 develop long-term relationships with potential customers.

20 Countless courts have found irreparable harm upon a finding of infringement  
21 of a valid patent. As noted above, Judge Sabraw recently determined that lost  
22 competitive advantage resulting from a defendant's infringing conduct demonstrates  
23 irreparable injury. *I-Flow Corp. v. Apex Medical Tech., Inc.*, Case No. 07-cv-1200,  
24 2010 U.S. Dist. LEXIS 1021, at \* 5 (S.D. Cal. Jan. 6, 2010). There are numerous  
25 other cases confirming that irreparable harm exists upon the jury's finding of  
26  
27

1 infringement. *Kowalski v. Mommy Gina Tuna Resources*, Case. No. 05-679, 2009  
2 U.S. Dist. LEXIS 26216, at \* 3-4 (D. Haw. Mar. 30, 2009); *BIC Corp.*, 1999 U.S.  
3 Dist. LEXIS 15991, at \*16; *L&W, Inc. v. Shertech, Inc.*, Case No. 01-73892, 2005  
4 U.S. Dist LEXIS 34635, at \*9 (E.D. Mich. Sept. 28, 2005); *Ciena Corp. v. Corvis*  
5 *Corp.*, 334 F. Supp. 2d 610, 612 (D. Del. 2004).

7         These cases follow the Federal Circuit's finding that "[i]n matters involving  
8 patent rights, irreparable harm has been presumed when a clear showing has been  
9 made of patent validity and infringement." *Richardson v. Suzuki Motor Co.*, 868  
10 F.2d 1226, 1247 (Fed. Cir. 1989) (reversing the district court's denial of a  
11 permanent injunction upon a finding of infringement). "This presumption derives in  
12 part from the finite term of the patent grant, for patent expiration is not suspended  
13 during litigation, and the passage of time can work irremediable harm." *Id.* It  
14 should be noted that the court in *Christiana Indus., Inc. v. Empire Elecs., Inc.*,  
15 provided the correct finding that "*ebay* did not invalidate the presumption" but  
16 rather the "*ebay* Court addressed the proper analysis for permanent injunctive  
17 relief." Case No. 06-12568, 2006 U.S. Dist. LEXIS 54210, at \*5 (E.D. Mich. Aug.  
18 4, 2006).

23         In light of the danger that a competitor will usurp a patent holder's rightful  
24 benefits, it is unsurprising that, since *eBay* was decided, competitors have been  
25 enjoined in over 30 cases. *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d at  
26



1 703 (Fed. Cir. 2008); *I-Flow Corp. v. Apex Medical Tech., Inc.*, Case No. 07-cv-  
2 1200, 2010 U.S. Dist. LEXIS 1021, at \* 5 (S.D. Cal. Jan. 6, 2010); *Funai Electric*  
3 *Co v. Daewoo Electronic Corp.*, 593 F.Supp. 2d 1088, 1111 (N.D. Ca. Jan. 5, 2009)  
4 (permanent injunction is appropriate in light of infringer's impact on relationship  
5 with customer and "that Daewoo's infringement put Funai in the position of aiding a  
6 direct competitor and denied it the right to exclude that a patent is intended to  
7 afford"); *Fresenius Medical*, 2008 U.S. Dist. LEXIS 79689, at \*13 (permanent  
8 injunction granted).

11 When courts have refused to award injunctive relief, it is almost always  
12 because the infringer does not compete with the patent holder. *See, e.g., Amado v.*  
13 *Microsoft*, 517 F.3d 1353, 1360-61 (Fed. Cir. 2008) (upholding the decision to  
14 dissolve permanent injunction awarded to non-competitor). In *Advanced*  
15 *Cardiovascular Systems, Inc. v. Medtronic Vascular, Inc.*, 579 F.Supp. 2d 554, 560  
16 (D. Del. 2008), the district court denied injunctive relief to a patent holder which  
17 had licensed the patents in suit to other competitors.

21 By contrast, Presidio and ATC are direct competitors. In addition, Presidio  
22 has never licensed the '356 patent. (Trial Tr. 2 at 113:17-19). Presidio's ability to  
23 exclude others from making and offering for sale products that infringe the '356  
24 patent, like ATC's 545L product, give Presidio a competitive advantage. *Id.* at  
25 113:20-114:9. The market is way too small for Presidio to survive if a competitor

1 like ATC is allowed to make an offer for sale products that infringe the '356 patent.  
2 *Id.* That, in combination with ATC's vastly larger size, would make it difficult, if  
3 not impossible, for Presidio to compete. (Trial Tr. 3 at 5:25-6:14).

4  
5 In short, there is not enough room for two players in the market. (Trial Tr. 2  
6 at 113:20-114:9). Further, "[i]f the outcome of this was a license to this patent to  
7 [Presidio's] competitor, it would pretty much spell the end of this, of this product  
8 area for [Presidio]...". *Id.* at 114:10-24. That is because ATC would be able to  
9 price the 545L capacitor far lower than could Presidio, forcing the entire market to  
10 ATC. *Id.*; Trial Tr. 6 at 88:14-21 (ATC employee Robert Grossbach discussing  
11 ATC's ability to "crush" Presidio and offer better deals because it is a large  
12 conglomerate affiliated with AVX and Kyocera). Thus, in the few cases in which  
13 post-*eBay* courts have denied permanent injunctive relief to competitors, there were  
14 circumstances that are absent from Presidio's situation.

15  
16 Presidio's determination to reserve the benefits of exclusivity for itself shows  
17 the competitive value of the '356 patent to Presidio. As the *Advanced*  
18 *Cardiovascular* court observed: "Permanent injunctions are typically granted in  
19 two-competitor situations where the patentee has demonstrated an unwillingness to  
20 part with the exclusive right." *Id.* at 560-61 (emphasis added) (cited cases omitted)).  
21 Here, Presidio enjoys the rebuttable presumption of irreparable harm based upon the  
22  
23  
24  
25  
26  
27

1 jury's finding that the '356 patent is valid and infringed. Moreover, as discussed  
2 below, the circumstances of this case unquestionably establish irreparable harm.

## 3                   **2.      Presidio And ATC Are In Direct Competition**

4                   “Intellectual property enjoys its highest value when it is asserted against a  
5 direct competitor in the plaintiff's market.” *Visto Corp. v. Seven Networks, Inc.*,  
6 Case No. 2:03-cv-333, 2006 U.S. Dist. LEXIS 91453, at \*12 (E.D. Tex. Dec. 19,  
7 2006) (post-*eBay* decision granting a permanent injunction to restrict the patentee's  
8 direct competitor and finding that direct competition “weighs heavily in the court's  
9 analysis.”). Here, the patentee, Presidio, manufactures, markets, and sells the BB  
10 capacitor, which is in direct competition with ATC's infringing 545L capacitor. As  
11 demonstrated at trial, business that ATC gains through infringement is business that  
12 is lost to Presidio.

13                   According to the jury, ATC has acted willfully. Making matters worse, and  
14 despite the jury's finding that the '356 patent is valid and willfully infringed, ATC  
15 continues to offer for sale the 545L capacitor. (*See* Exhibit A). ATC's cavalier  
16 view of the jury's finding is incredible, and warrants imposition of an injunction:

17                   Where, as here, there is a continuing risk of future  
18 infringement, and '[b]ecause the principal value of a  
19 patent is the statutory right to exclude, the nature of the  
20 patent grant weighs against holding that monetary  
21 damages will suffice to make the patentee whole.' *Reebok*  
22 *Int'l v. J. Baker, Inc.*, 32 F.3d 1552, 1557 (Fed. Cir. 1994).  
23 As the patent holder, Mr. Kowalski has a right to license  
24 without having to pursue litigation, or if he chooses to

1 produce his invention himself, he has the right to do so  
2 unhampered by infringing competitors.

3 *Kowalski v. Mommy Gina Tuna Resources*, Case No. 05-679, 2009 U.S. Dist.  
4 LEXIS 26216, at \* 3-4 (D. Haw. Mar. 30, 2009).

5 In the analogous case of *TiVo Inc. v. EchoStar Communs. Corp.*, TiVo  
6 requested a permanent injunction against its direct competitor, EchoStar, to stop its  
7 infringing sales of digital video recorders. 446 F. Supp. 2d 664, 669 (E.D. Tex.  
8 2006). In granting a permanent injunction to the patentee TiVo, the Court found  
9 that the “availability of the infringing products lead[] to loss of market share for  
10 Plaintiff [TiVo]’s products.” *Id.* Specifically, the Court noted that Echostar  
11 targeted potential customers of TiVo’s digital video recorder, and this direct  
12 competition lead to TiVo’s loss of critical market share. *Id.*

13 The Federal Circuit has expressly recognized direct competitive harm, such as  
14 that experienced by Presidio, as irreparable: “Competitors change the marketplace.  
15 Years after infringement has begun, it may be impossible to restore a patentee’s (or  
16 an exclusive licensee’s) exclusive position by an award of damages and a permanent  
17 injunction.” *Polymer Techs. v. Bridwell*, 103 F.3d 970, 975-976 (Fed. Cir. 1996)  
18 (vacating denial of a preliminary injunction).<sup>1</sup> “Customers may . . . establish[]  
19  
20  
21  
22  
23  
24

25 <sup>1</sup> The analysis of equitable factors for a preliminary injunction is relevant to the analysis for a  
26 permanent injunction because “the standard for a preliminary injunction is essentially the same as  
27 for a permanent injunction with the exception that the plaintiff must show a likelihood of success  
28 on the merits rather than actual success.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546  
n.12 (1987).

1 relationships with infringers,” and may no longer be available to be won back by the  
2 patentee. *Id.*

3       Indeed, that is precisely what has happened here. There have been numerous  
4 instances where, as a direct result of ATC’s sales of its infringing 545L capacitor to  
5 Presidio’s potential customers, Presidio has been effectively precluded from  
6 entering into business relationships with those potential customers. The availability  
7 of ATC’s infringing 545L capacitor has therefore changed the marketplace, and  
8 ATC’s solicitation of Presidio’s actual and potential customers has caused these  
9 customers to form relationships with the infringer, ATC, rather than the market  
10 innovator, Presidio. Presidio has therefore been irreparably denied significant  
11 advantages of being the incumbent supplier.  
12

13       Moreover, if ATC is permitted to sell an infringing product to a customer, that  
14 customer is not likely to need a different supplier for many years, thereby reducing  
15 Presidio’s opportunity to sell to that customer for years. *See Hybritech, Inc. v.*  
16 *Abbott Laboratories*, 849 F.2d 1446, 156 (Fed. Cir. 1988) (irreparable harm may be  
17 found where the patentee is denied the opportunity to exercise its patent rights to  
18 establish a market position and create business relationships in the market). The  
19 denial of a permanent injunction deprives Presidio of any meaningful right to  
20 exclude others from using its invention. *See Bell & Howell Doc. Mgmt. Prods. Co.*  
21 *v. Altek Sys.*, 132 F.3d 701, 708 (Fed. Cir. 1997) (“When, as here, the market for a  
22  
23  
24  
25  
26  
27

1 patented product is in decline, the passage of time is particularly likely to irreparably  
2 harm the patentee.”). A permanent injunction is the only remedy available to cease  
3 Presidio’s harm and prevent its reoccurrence.

4  
5 In the instant case, the continued availability of ATC’s 545L, which the jury  
6 has found to be infringing, leads to loss of market share for Presidio. Furthermore,  
7 Presidio’s loss of market share is heightened by the fact that ATC directly targets  
8 potential customers of Presidio.  
9

### 10 **3. ATC’s Infringing Activities Have Damaged Presidio’s** 11 **Reputation**

12 At trial, the evidence of Presidio’s reputation as the sole supplier that solves  
13 particular problems of customers went undisputed. Through at least the testimony  
14 of Lambert Devoe, Presidio demonstrated that customers look to Presidio as a  
15 provider of unique solutions to problems that go unresolved with other suppliers. If  
16 ATC is allowed to continue with its infringing 545L capacitor, and thereby provide  
17 customers with such unique solutions, Presidio’s reputation is forever tarnished and  
18 damaged.  
19

20  
21 Additionally, ATC has freely sold its infringing products to the market at a  
22 reduced price. The Federal Circuit has found that price erosion that results from  
23 infringement, such as that caused by ATC, constitutes irreparable harm because  
24 “[r]equiring purchasers to pay higher prices after years of paying lower prices to  
25 infringers is not a reliable business option.” *Polymer Techs.*, 103 F.3d at 976; *see*  
26  
27

1 also *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368  
2 (Fed. Cir. 2001) (affirming finding of irreparable harm due to price erosion).

3 **C. Monetary Damages Are Inadequate For Presidio's Injury**

4 From the day its complaint was filed, Presidio's primary objective has been to  
5 obtain injunctive relief to stop its much larger competitor, ATC, from infringing  
6 Presidio's patented technology. Indeed, at trial Presidio's Lambert Devoe testified  
7 that an injunction is critical for Presidio's survival, and that Presidio has spent more  
8 money pursuing this case that it ever hoped to recover.  
9

10 "It may be impossible through money damages to return a competitor to the  
11 position it would have been absent infringement." *Polymer Techs.*, 103 F.3d at 975-  
12 76. Because the principal value of a patent is its statutory right to exclude, the very  
13 nature of the patent grant suggests that monetary damages cannot suffice to make  
14 the patentee whole for infringement. *See Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d  
15 1552, 1557 (Fed. Cir. 1994). As the trial court in the well-known Polaroid case  
16 explained:  
17

18 [District courts] have found money damages deficient  
19 against encroachments on rights of exclusivity, and they  
20 have judged the public interest better served by a broad  
21 policy favoring creativity than by narrow protection of  
22 specific consumers.

23 *Polaroid Corp. v. Eastman Kodak Co.*, 641 F. Supp. 828 (D. Mass. 1985), aff'd, 833  
24 F.2d 930 (Fed. Cir. 1986) (affirming district court's entry of injunctive relief).  
25

1           ATC's infringement has certainly damaged Presidio, a small company with  
2 relatively limited resources. Presidio has funded the significant expense of this  
3 lawsuit to expose the infringing activities of ATC. Now that the jury has  
4 determined that Presidio's '356 patent is valid and ATC's 545L capacitor is an  
5 infringement, the need for a permanent injunction is great. The effects of future  
6 infringement cannot be fully measured in dollars because "there are certain  
7 tangential benefits associated with patent rights, such as a marketplace reputation for  
8 enforcing one's patents, the value of which cannot be quantified in monetary  
9 damages." *Fisher-Price, Inc. v. Safety 1st, Inc.*, 279 F. Supp. 2d 526, 528 (D. Del.  
10 2003) (granting the motion for permanent injunction); *see also Atlas Powder Co. v.*  
11 *Ireco Chems.*, 773 F.2d 1230, 1233 (Fed. Cir. 1985) ("The patent statute further  
12 provides injunctive relief to preserve the legal interests of the parties against future  
13 infringement which may have market effects never fully compensable in money.").

14           It must also be noted that the Southern District of California has recently  
15 determined that a defendant's infringement results in injury for which any legal  
16 remedy other than a permanent injunction is often inadequate:

17                       As Plaintiff points out, it made a strategic decision not to  
18 license the patented technology at issue in this case to  
19 anyone, thereby establishing its position as the market  
20 leader. By virtue of Plaintiff's dealings with Defendants,  
21 Plaintiff lost its status as the sole provider of soft shell  
22 pain pumps. That is an injury from which Plaintiff is  
23 unlikely to recover, and is one that is not amenable to a  
24



1 legal remedy. Accordingly, this factor weighs in favor of  
2 an injunction.

3 *I-Flow Corp. v. Apex Medical Tech., Inc.*, Case No. 07-cv-1200, 2010 U.S. Dist.  
4 LEXIS 1021, at \* 6 (S.D. Cal. Jan. 6, 2010).

5 In *3M Innovative Props. Co. v. Avery Dennison Corp.*, the district court  
6 found that money damages were inadequate because the grant of money damages to  
7 3M for Avery's future infringement would essentially force 3M to grant a license to  
8 Avery. Case No. 01-1781, 2006 U.S. Dist. LEXIS 70263, at \*5 (D. Minn. Sep. 25,  
9 2006) (considering the *eBay* factors and granting a permanent injunction). The  
10 Court in *3M Innovative Props. Co.* stated that it would "not disturb 3M's  
11 determination that its business interests will not be served by the licensing of this  
12 product." *Id.*

13 Similarly, Presidio has not licensed the '356 patent, which shows that it has  
14 not chosen to forego its granted exclusivity for compensation. Therefore, Presidio  
15 should not be forced to grant a license to ATC by being compensated for future  
16 infringement only through monetary damages. Furthermore, to preserve its  
17 reputation and goodwill, Presidio must be allowed to capture the market share  
18 associated with its innovations in the field of capacitors. "Under such  
19 circumstances, a patent owner's right to exclude 'cannot be compensated through  
20 monetary damages,' especially because it is impossible to determine the portions of  
21 the market the patent owner would have secured but for the infringer or how much  
22  
23  
24  
25  
26  
27

1 damage was done to the patent owner's brand recognition or goodwill due to the  
2 infringement." *Black & Decker v. Robert Bosch Tool Corp.*, Case No. 04-C-7955,  
3 2006 U.S. Dist. LEXIS 86990, at \*11 (N.D. Ill. Nov. 29, 2006) (granting a  
4 permanent injunction against Bosch's infringing radios) (citing *Reebok Int'l*, 32 F.3d  
5 at 1558 ("Harm to reputation resulting from confusion between an inferior accused  
6 product and a patentee's superior product is a type of harm that is often not fully  
7 compensable by money because the damages caused are speculative and difficult to  
8 measure.")).

11 Presidio demonstrated at trial the many ways in which ATC has improperly  
12 used Presidio's patented technology to gain market advantages that Presidio should  
13 have exclusively enjoyed. The loss of sales, the incumbency problems, and the  
14 price cutting perpetrated by ATC are all harms suffered by Presidio that cannot be  
15 fully remedied with an award of money damages. Rather, they are classic instances  
16 of actual, irreparable harm that only a permanent injunction can cure going forward.

19 **D. The Balance of Hardships Favors Presidio And Warrants An**  
20 **Injunction**

21 Because this case involves a fast changing marketplace where customer needs  
22 can change, an injunction is especially important to Presidio's ability to exercise its  
23 patent rights. Where markets are defined by rapid changes or advances in  
24 technology, courts have recognized that there is often a limited window of  
25 opportunity to market one's inventions. This limited window justifies the patent

holder's exclusive monopoly to practice the patented technology unimpeded by competitors. *See Mezzalingua Assocs. v. Arris Int'l, Inc.*, 298 F. Supp. 2d 813, 821 (W.D. Wis. 2003) ("With the rapid changes in connector technology, the market for plaintiff's [product] will not last forever, or even necessarily for the entire term of its patent. If plaintiff is going to be able to extract its bargained-for-benefit from its patented invention, it needs to be able to sell its product freely, unimpeded by infringers.").

ATC representatives testified at trial that ATC could always re-start sales of its 540L capacitor. Thus, ATC has other products it can market to its customers. ATC's more than \$90 million in annual sales illustrates that being enjoined from selling one of its many products, which has modest (for ATC) annual sales, will pose no hardship to ATC. (Trial Tr. 5 at 31:10-17: ATC's sales of its 545L capacitor account for "a very small percentage."). Furthermore, ATC is a wholly owned subsidiary of a company with more than \$1 billion in annual revenue. Regardless, ATC elected to offer for sale the 545L, and having been found to be a willful infringer, should not be heard to complain about an injunction. *Broadcom*, 543 F.3d at 704.

Presidio is, on the other hand, a much smaller company and losing marketshare is a significant hardship. Furthermore, being wrongfully deprived of the exclusivity granted by the '356 patent would be a serious injury to Presidio.

1 Thus, the harm to ATC as the result of an injunction would be minimal in  
2 comparison to the harm experienced by Presidio.

3 **E. The Public Is Served By Enforcing Presidio's Patent Rights**

4 "The public is best served by enforcing patents that are likely valid and  
5 infringed." *Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir.  
6 2006); *see also Smith Int'l, Inc.*, 718 F.2d at 1581 ("where validity and continuing  
7 infringement have been clearly established," failure to grant an injunction is  
8 "contrary to the public policy underlying the patent laws."). Otherwise stated, it is  
9 in the public interest to uphold a patent holder's legally established rights. *See*  
10 *generally Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1547 (Fed.Cir.1995) (en  
11 banc).

12 As the Federal Circuit stressed in *Broadcom*: an infringer should not be  
13 permitted to avoid a permanent injunction "on a theory 'that successful exploitation  
14 of infringing technology shields a party from injunctive relief.'" 543 F.3d at 704.  
15 Further, the removal of a product from the market only implicates the public interest  
16 where the product at issue is of unusual societal benefit. *See Paice LLC v. Toyota*  
17 *Motor Corp.*, Case No. 2:04-cv-211-DF, 2006 U.S. Dist. LEXIS 61600 (E.D. Tex.  
18 Aug. 16, 2006) (noting that an injunction could harm the public interest in a  
19 "burgeoning hybrid [car] market"); *Advanced Cardiovascular Systems, Inc. v.*  
20 *Medtronic Vascular, Inc.*, 579 F. Supp.2d at 560 (finding removal against the public  
21 interest).

1 interest in light of numerous cardiologist's affidavits that the success rate of their  
2 surgeries would precipitously drop if the infringing products were removed from the  
3 market).

4 Here, however,

5  
6 Plaintiff identifies three public interests that would be  
7 served by an injunction: The interest in maintaining a  
8 strong patent system, the interest in fair and healthy  
9 competition, and the interest in discouraging future  
10 wrongdoing. The Court agrees with Plaintiff that these  
interests would be served by an injunction in this case.  
Accordingly, this factor weighs in favor of an injunction.

11 *I-Flow Corp. v. Apex Medical Tech., Inc.*, Case No. 07-cv-1200, 2010 U.S. Dist.  
12 LEXIS 1021, at \* 7 (S.D. Cal. Jan. 6, 2010).

13  
14 The jury has found that the '356 patent is valid and infringed by ATC.  
15 Therefore, this fourth factor weighs heavily in favor of serving the public interest by  
16 enforcing the '356 patent and granting a permanent injunction to prevent continuing  
17 infringement by ATC. Failure to grant an injunction fails the public's interest by  
18 undermining the policy behind patent laws.  
19  
20

#### 21 **IV. CONCLUSION**

22  
23 Presidio respectfully requests that the Court permanently enjoin ATC  
24 from marketing, selling, and offering to sell its 545L capacitor, as set forth in  
25 Presidio's Motion for Permanent Injunction.  
26  
27

1 Dated: January 29, 2010

Respectfully submitted,  
WOOD, HERRON & EVANS L.L.P.

2  
3  
4  
5 By: s/ Brett A. Schatz  
6 Gregory F. Ahrens  
7 Brett A. Schatz  
8 Attorneys for Plaintiff  
9 Presidio Components, Inc.  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**PROOF OF SERVICE**

STATE OF OHIO )  
 ) ss.  
 COUNTY OF HAMILTON )

I am employed in the County of Hamilton, State of Ohio. I am over the age of 18 and not a party to the within action. My business address is: 2700 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202.

On January 29, 2010, I served **PLAINTIFF PRESIDIO COMPONENTS, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR PERMANENT INJUNCTION** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope at Cincinnati, Ohio addressed as follows:

Daniel T. Pascucci  
 Nathan R. Hamler  
 MINTZ, LEVIN, COHN,  
 FERRIS, GLOVSKY AND  
 POPEO, P.C.  
 3580 Carmel Mountain Road,  
 Suite 300  
 San Diego, California 92130  
 Attorneys for Defendant AMERICAN TECHNICAL CERAMICS CORP.

Marvin S. Gittes  
 Timur E. Slonim  
 Peter F. Snell  
 MINTZ, LEVIN, COHN, FERRIS,  
 GLOVSKY AND POPEO, P.C.  
 66 Third Avenue  
 New York, NY 10017

☒ **(BY MAIL AND EMAIL)** The envelope was mailed with postage thereon fully prepaid. As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Cincinnati, Ohio in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY HAND DELIVERY)** I caused the attached document to be personally delivered to the above named individual.

☐ **(BY FACSIMILE)** I delivered such document by facsimile to the ABOVE persons at the facsimile telephone numbers listed ABOVE as a courtesy.

☐ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 29, 2010 at Cincinnati, Ohio.

s/ Brett A. Schatz  
 Brett A. Schatz